(1) Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

J.C. HERBERT BRYANT, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Special Deputy U.S. Marshal is an "officer or employee" of the United States Government as proscribed by Title 18 United States Code, Section 912.

2. Whether the Appellant Court had "jurisdiction" to correct what it called a "gross injustice".

LIST OF PARTIES

The names of all parties to the proceeding below appear in the caption of this case.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, J.C. Herbert Bryant, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on July 8, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 117 F.3d 1464 (D.C. Cir. 1997) and is reproduced at Pet. App. A.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was issued on July 8, 1997. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Title 18, United States Code, Section 912, provides in pertinent part:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.

STATEMENT

1. Introduction

This petition presents two significant questions on which the federal courts of appeals are in conflict.

First, the petitioner seeks review of the D.C. Circuit's refusal to find that Title 18, United States Code, Section 912 does not make a person so appointed an "officer or

employee" of the U.S. Government as proscribed by Title 18, United States Code, Section 912.

Second, the petition seeks review of the D.C. Circuit's refusal to correct what it called a "gross injustice" in the prosecution and conviction below. Despite its limited jurisdiction, faced with the conflicting testimony below and refusal by the District Court Judge to consider defendant's testimony along with the corroborating testimony, the D.C. Circuit should have reversed the conviction below.

2. Factual Background

The petitioner, J.C. Herbert Bryant, Jr., had been a Special Deputy U.S. Marshal for seven years by virtue of his affiliation with a group of volunteers (ARGUS) (the Armed Response Group of the United States), which loaned armored vehicles to police agencies during emergencies. In 1992, *The Washington Post* published a series of articles critical of ARGUS and of Bryant, implying that he had been granted Special Deputy status because of his family money and political connections. *See, e.g.*, Robert O'Harrow, Jr., *FBI Probes Self-Styled Police Force*, WASH. POST, May 10, 1992, at A1. The then-director of the Marshals Service Henry Hudson wrote Bryant advising him to send Hudson a letter asking not to be reappointed, which Bryant did. His appointment thus expired on June 30, 1992, only two months before the events leading to his conviction.

On September 2, 1992, Bryant drove his truck into the District of Columbia and parked it near the side entrance of the Mayflower Hotel. In the window was a placard bearing the words "U.S. Marshal" in bold print and in back were several pistols, visible if you walked up to the vehicle. After a brief time inside the hotel, Bryant emerged to discover that

the vehicle had attracted the attention of several governmental officials due to the fact that, unbeknownst to Bryant, an Israeli diplomatic delegation had been visiting the hotel.

Bryant approached the vehicle and identified himself as its driver and was questioned. Numerous conversations were had, but Bryant was not arrested and/or charged, however, he and his vehicle were taken from the scene, and arguably from the Metropolitan Police central, by members of the U.S. Marshal's service to the U.S. Marshal's office.

Washington Post reporter Mr. O'Harrow, learning of the incident, published a news story in the *Post* some three weeks later, on September 24, accusing the Marshals Service of intervening to help Bryant.

After Bryant told police he had friends in the Marshals Service, a deputy marshal was sent to the scene, law enforcement officials said... When asked why no legal action was taken against Bryant, Twomey said the District police officer 'chose simply to turn the weapons and Mr. Bryant over to the marshal.' But the District police official, who ordered the retrieval of Bryant's guns from the Marshals Service yesterday, said Bryant was released only because *the Marshals Service* 'represented to us he was a U.S. Marshals deputy.'

Robert O'Harrow, Jr., *Quasi-Police Official Freed in Gun Case*, WASH. POST, Sept. 24, 1992, at A1 (emphasis added). Only then does the question of appellant's misrepresentation arise. *Id* ("[A]fter inquiries from the Washington Post, District police said they plan to investigate the Sept. 2 incident and turn over their findings to the U.S. attorney in the District.") Both the marshals' headquarters and the Marshals Office in the District of Columbia disclaimed

responsibility for allowing Bryant to be released and at trial blamed each other for improper behavior.

From this incident, almost two (2) years later, (June 14, 1994) Bryant is indicted for (A) violating Title 18, United States Code, Section 912, by falsely assuming and pretending to be a Special Deputy United States Marshal, and due to same, demanding and obtaining he not be arrested; and (B) for violating D.C. Code, Section 22-3204(4) , a misdemeanor for having weapons in the district, and for (C) violating Title 18, United States Code, Section 1001 for making false statements.

In October of 1994, Bryant elected to go to trial before the Honorable Royce C. Lambreth, U.S. District Judge, waiving a jury and proceeding solely as a bench trial.

Mr. Bryant's principal defense to the firearms charge was that he was a duly sworn authorized deputy sheriff of Warren County, Mississippi and therefore exempt from the D.C. Code prohibiting the possession of a firearm. (He never relied on the expired SDUSM status).

As to the other counts, Mr. Bryant testified and maintained that he never said he was, in-fact, a Special Deputy United States Marshal and this was corroborated by other, non-biased witnesses at the scene.

However, the district judge convicted Bryant on counts 1 and 3 and acquitted him on Count 2 (the weapons charge).

Your petitioner appealed this conviction, and on July 8, 1997, the Court of Appeals for the District of Columbia "affirmed" these convictions. Interestingly, however, Judge

Henderson, writing for the majority, wrote a separate concurring opinion, as did Judge Silberman, and both conclude by saying that, your petitioner not only should not have been convicted, but never should have even been prosecuted, and this case was a "gross injustice".

3. The District Court Proceedings

A bench trial was held in October of 1994 at which Bryant testified that he never stated to anyone on September 2, 1992, that he was a Special Deputy United States Marshal. He further testified, along with his life-long friend, Sheriff Paul Barrett [See 111 F.3d. 947 (D.C. Cir. 1997), cert. den. 118 S.Ct. 176 (1997)] that he was exempt from the prohibition, Section 22-3205 due to his status as a deputy sheriff of Warren County, Mississippi.

Numerous witnesses testified, and conflict abounded! Diplomatic Security Service Agent Mark Conord testified that Bryant identified himself as a Warren County deputy, but also as a Special Deputy U.S. Marshal (10/3/94 TR.1, 12, 45). However, as Judge Silberman points out, it was Conord who allowed the matter to be turned over to the U.S. Marshals, and he was , in-fact biased because he was responsible. Plus, his testimony was hardly convincing, especially with his partner, Agent Perkins saying "...nobody ever told me Mr. Bryant says he is a Special Deputy U.S. Marshal"

Due to the confusion and/or for whatever reasons, MPD officers on the scene called the District of Columbia U.S. Marshals Office to clarify the situation. Rather than telling MPD, Bryant isn't "one of them"(...if he really said he was), they dispatched several Deputy U.S. Marshals to the scene. Deputy Robert Williamson, a supervising deputy arrived and testified later that he inferred/heard Bryant say he

was a SPUSM. (10/4/94, TR. At 21,27) yet he too never told his superior or anyone else until trial.

Ironically, and yet one of the essential elements under this statute, the testimony at trial developed that it was Herbert M. Rutherford III, (then U.S. Marshal for the District of Columbia), who "demanded and obtained" that Bryant not be arrested and had him, his vehicle, and its contents brought to the Marshals office.

Despite this troublesome conflict, and in the face of the clear, unbiased testimony of Agent Perkins, and others, including Carl Crawford, security director for the Mayflower Hotel, on-the-scene - vouching for Bryant's "denial" and depiction of events, Judge Lambreth finds him guilty.

The court as to count 1 specifically found that Bryant claimed to be a Special Deputy U.S. Marshal, during the course of his detention at the Mayflower Hotel, crediting the testimony of Agent Conord and Deputy Williamson. (10/16/94, Trial 7) He "rejected" Bryant's testimony and others on Count 3, and similarly he found that Bryant represented to Agent Conord and to Deputy Williamson he was a Special Deputy U.S. Marshal (The Judge "acquitted" Bryant of the firearms charge).

On August 31, 1995 the Court sentenced Bryant to six (6) months incarceration.

Mr. Bryant appealed his conviction, however, the D.C. Circuit "affirmed" both convictions in a highly unusual opinion.

4. The D.C. Circuit's Ruling

The case was argued before Judges Silberman, Henderson and Tatel, with Judge Henderson writing the opinion for the Court and also writing a concurring opinion as did Judge Silberman.

At oral argument, prior to an opinion being rendered, Judge Henderson, on the Court's own motion, requested "supplemental briefs" on the issue of whether a Special Deputy U.S. Marshal was covered by Title 18, United States Code Section 912. Both sides briefed the issues and submitted same prior to the July 8, 1997 ruling.

The court in its opinion, despite the apparent conflicts, declined to reverse the conviction due to the deference afforded the trial judge. Ironically, despite Judge Henderson raising the above-issue at oral argument, she never addressed it in the majority opinion, but concludes in her concurring opinion that she believes a Special Deputy Marshal is not an officer or employee of the U.S.... the impersonation of which is prohibited by Title 18, USC 912. Further she believes that the circuit precedent is wrong!

Also, Judge Silberman, joined in the majority affirmation, but wrote separately, ending by saying he was powerless, given the scope of review of a district judge's factual finding from seeking to rectify this gross injustice!

Lastly, both Judge Henderson and Judge Silberman stated that not only would they never have convicted Bryant, neither would have even prosecuted him for these alleged acts and unusual circumstances.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT AMONG THE CIRCUITS AND/OR NO CLEAR MANDATE AS TO WHETHER A SPECIAL DEPUTY UNITED STATES MARSHAL IS AN "EMPLOYEE OR OFFICER" AS PROSCRIBED BY TITLE 18, UNITED STATES CODE, SECTION 912.

Basically, your petitioner submits that (A) the Special Deputy United States Marshal designation/appointment does not make one so appointed an "employee or officer" of the United States Government, and (B) there was no constitutional authority for appointment of special deputies, and (C) Special Deputy United States Marshals are honorary posts and clearly distinguishable from Deputy United States Marshals.

Title 18, United States Code, Section 912, commonly referred to as "Personation of a Federal Officer" proscribes "falsely assum[ing] or pretend[ing] to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof. . ." 18 U.S.C. Section 912. It is a conviction under this statute which, in part, forms the basis of Bryant's appeal.

Neither Title 18, generally, nor Section 912, specially, define "officer" or "employee" as the terms are to be applied when enforcing the statute. Thus,

> the governing principles indicate that penal statutes are to be interpreted with exactitude.

"Reasonable precision in the definition of crime has been regarded as a desideratum by free people since the early days of common law." Moreover, the specification of criminal offenses is peculiarly the business, not of courts, but of legislatures. ***Criminal statutes are thus "to be construed strictly, not loosely;*** [s]tatutes will not be read to create crimes. . . unless the purpose so to do is plain," and ***"ambiguity" concerning the ambit of criminal statutes "should be resolved in favor of lenity."*** Zaimi v. United States, 476 F.2d 511, 523-24 (D.C. Cir. 1973) (citations omitted) (emphasis added).

The United States Supreme Court held in Pierce v. United States, 314 U.S. 306, 86 L.Ed. 226, 62 S. Ct. 237 (1941), "[w]hile this act [§ 912's predecessor] should be interpreted so as to give full effect to its plain terms, the court should not depart from its words and context." 314 U.S. at 311-12; 86 L.Ed. at 231; 62 S. Ct. at 240 (holding an officer or employee of a government corporation is not an officer or employee of the government under the language of the statute). Although the Pierce court addresses corporations owned or controlled by the United States and distinguishes them from "the government" language as contained in the statute, the law is equally applicable to the distinctions existing between Special Deputy U.S. Marshals and federal officers and employees. As in Pierce where the Court refused to expand the language of the statute, this Honorable Court is prohibited from departing from the the plain terms of "officer or employee" as contemplated by the drafters of § 912. Expanding "officer or employee" to include a Special Deputy United States Marshal, who is not an officer or employee, is error.

"As a general rule, an officer of the United States is one who holds his place by virtue of an appointment by the President, by one of the federal courts of justice, or by the heads of federal departments authorized to make such appointment . . . it must be something more than employment." 63 Am. Jur 2d, Public Officers and Employees, § 18, p.679 (1984) (citations omitted). "Although individuals may occupy positions which are publicly funded and authorized by statute, this does not compel the conclusion that they are public officers. Instead, it is the nature of the office, the powers wielded, and the responsibilities carried out that are the key considerations." Id. at § 12, 675-76.

Bryant asserts that under no definition does "Special Deputy United States Marshal" qualify as an officer or an employee. The disclaimer plainly depicted on the identification cards issued to Special Deputies, states:

> The individual named herein is appointed, under authority delegated by the Attorney General, to perform th[illegible]ties of the Office of Special Deputy United [illegible]es Marshal as directed by an appro[illegible] official of the United States Marshals Service or some other appropriate Federal official as so designated. ***This appointment does not constitute employment by the United States Marshal Service, the United States Department of Justice, or the United States Government.*** The appointee agrees to perform the duties required under this Special Deputation with the knowledge ***that he or she is neither entering into an employment agreement with the Federal Government or any element***

> ***thereof nor being appointed to any position in the Federal Service by virtue of this special deputation***. The appointee understands and acknowledges that the authorities vested in him or her by this special deputation can only be exercised in furtherance of the mission for which he or she has been specially deputized and extends only so far as may be necessary to faithfully complete that mission. Moreover, those authorities terminate at the expiration of the term of the Special Deputation.

It seems apparent from the specific language above that a special deputy is not an employee and cannot be considered more than an employee. Therefore, he cannot qualify as an officer or as an employee under the statute.

Additionally, when Bryant was a special deputy he received no compensation for the title bestowed upon him. Lack of compensation further evidences the lack of official or employment status of a special deputy. See Metcalf & Eddy v. Mitchell, 269 U.S. 514, 70 L.Ed. 384, 46 S. Ct. 172 (1925); Hall v. Wisconsin, 103 U.S. 4, 26 L.Ed. 302 (1880); United States v. Germaine, 99 U.S. 508, 25 L.Ed. 482 (1879); United States v. Hartwell, 73 U.S. 385, 18 L.Ed. 830 (1868).

Title 28, United States Code §§ 561 et seq. establishes and enables the United States Marshals Service. Though the sections discuss in detail the powers and duties of deputy marshals, no mention is made of special deputies and their powers or duties. There is no constitutional authority for the appointment of special deputies. There is regulatory authority for such appointments.

During the grand jury questioning of former Director John Twomey, Mr. Twomey testified that "[t]he original authority to appoint special deputy U.S. marshals comes from the original creation of the office of U.S. Marshal . . . [but] currently, . . . the U.S. Marshals Service authority to deputize someone as a special deputy U.S. marshal is limited by the Code of Federal Regulations, which specifies that we may deputize a federal employee or a state or local sworn law enforcement officer."

The regulatory authority is found among 28 CFR §§ 0.19, 0.111, and 0.112 (1996). Section 0.19 empowers the Associate Attorney General with the "power and authority... to authorize the Director of the U.S. Marshals Service to deputize persons to perform the functions of a Deputy U.S. Marshal." 28 CFR §0.19 (1996). Section 0.111 generally permits the Director "to direct and supervise all activities of the U.S. Marshals Service" and further provides a listing of specific activities which he oversees. Section 0.112 is entitled "Special Deputation," and states

> [T]he Director, United States Marshals Service, is authorized to deputize the following persons to perform the functions of a Deputy U.S. Marshal in any district designated by the Director:
> (2) Selected federal, state, or local law enforcement officers whenever the law enforcement needs of the U.S. Marshals Service so require . . . .

28 CFR § 0.112 (1996).

Lastly, Special Deputy United States Marshals are

distinguished from Deputy United States Marshals. 28 U.S.C. §§ 561, et. seq. contain the authority for the deputy U.S. marshals. Within these sections one can locate the parameters within which deputy marshals function. As previously stated, there is no discussion pertaining to special deputies and their duties, authority or function in general. Chapter 37, Title 28, does provide us with bases for distinctions between the two positions. One of the most apparent distinctions is found in 28 U.S.C. § 566 (d) which states that each "marshal, deputy marshal, and any other official of the Service as may be designated by the Director may carry firearms and make arrests without warrant for any offense against the United States . . . or for any felony cognizable under the laws of the United States if he or she has reasonable grounds to believe that the person to be arrested has committed or is committing such felony." John Twomey testified that with regard to the appointment of Bryant as a special deputy, this statutory authority enjoyed by deputy marshals was severely curtailed in the case of special deputies.

John Twomey, former Deputy Director of the United States Marshals Service testified before the grand jury in this cause that when he deputized Bryant as a special deputy, "it was solely for the purpose of being armed to provide safe and secure transport for police vehicles from ARGUS . . . ." (p.20). Twomey also testified that as a special deputy Bryant *did not possess the authority to carry a weapon for any other reason or at any other time*. This excludes the weaponry allowances delineated in § 566, and therefore, effectively excludes a special deputy from any entitlement as an officer or employee or "other official" under these sections.

Further, § 564 specifically provides that deputy marshals "may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof."

28 U.S.C. § 564 (1988). This statute, however, does not limit the deputy marshals' authority to that of a sheriff but, rather, supplements the implied powers of federal marshals. United States v. Laub Baking Co., 283 F. Supp. 217 (D.C. Ohio 1968). There is no indication anywhere that special deputies possess this latitude. Quite to the contrary, special deputies are very limited in their authority and are limited in the time and scope of the exercise of their restricted authority as evidenced, once again, by the identification badge disclaimer.

All one has to do is look at the actual appointment to clearly see that this position was honorary and no more than a fund-raising type position.

Lastly, even if arguendo, it can be said that this honorary title conferred employee/officer status, the record below does not support the findings and conviction. Title 18, United States Code, Section 912, requires two (2) essential elements, (A) the false personification and (B) acting as such.

Given all the due deference to the trial judge, Bryant was a mere braggart of his political friends, not a criminal, and his conduct did not rise to the level prohibited by Title 18, United States Code, Section 912. Furthermore, it was Rutherford, not Bryant who "acted as such" and obtained the forebearance by the Metro Police Department not to have Bryant arrested. United States v. Rosser, 528 F.2d 652 (D.C. Cir. 1976).

The Court's reliance on United States v. Maxwell, 920 F.2d 1028 (D.C. Cir.1990) is misplaced and distinguishable from the instant case.

In Maxwell, it was clear that the appellant, did in-fact,

hold herself out as an employee and officer of the United States Department of the Treasury, used printed letterheads, etc. However, in the instant case the testimony was contradicted and more importantly, the alleged office, existed, but, can not be said to be an officer or employee of the government, given the plain meaning of these terms.

Furthermore, reliance upon United States v. Diamond, 53 F.3d 249 (9th Cir. 1995) doesn't resolve the question of Bryant's status either, as in that case, the officer, clearly was acting at the direction, control and request of the U.S. Government. Again, that case is not on point, and really deals with Title 18, United States Code, Section 111 and 1114 which are not involved here and lend little if any support by analogy.

Even Judge Silberman concluded that it was very unlikely Bryant actually said he held the Special Deputy U.S. Marshal office at the scene. Your petitioner submits that the "very unlikely conclusion" certainly opened the door to the Court's jursdiction and should have allowed reversal, even given the great deference standard. Therefore, the petition herein should be granted to correct this gross injustice.

II.

WHETHER THE APPELLANT COURT HAD JURISDICTION TO CORRECT WHAT IT CALLED A "GROSS INJUSTICE"

Just a cursory reading of the opinion below clearly shows that the D.C. Circuit should have reversed the convicitions below even under the difficult standard of deference.

Conflicting testimony, questionable memory, bias and concern about an alleged "cover-up" abounded.

These unexplainable actions, alleged calls that never occured and selective memory all amounted to a huge gap in this case, preventing a conviction by a reasonable-minded jury.

There was no convincing evidence upon which a guilty verdict could be based.

Despite the prosecutors contempt for petitioner's wealth or family background, there exists a fundamental tenet in our criminal jurisprudence that a jury (or judge herein) should not premise its verdict upon a general evaluation of the defendant's character but rather upon an assessment of the evidence relevant to the particular crime with which the defendant is presently charged. United States v. Lauelle, 751 F.2d. 1266, 1275 (D.C. Cir. 1985); United States v. Sutton, 801 F.2d. 1346, 1360 (D.C. Cir. 1986)

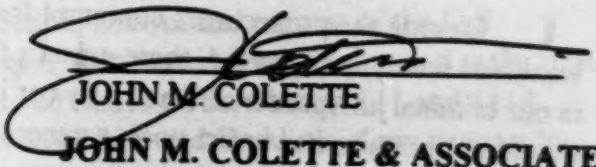
The standard governing review of a guilty verdict is to accord the verdict great deference and the conviction must be reversed when the evidence is such that a reasonable mind could not find guilt beyond a reasonable doubt. United States v. Caste Llanos, 731 F.2d. 979, 984 (D.C. Cir. 1984)

Your petitioner agrees with this standard, however the deference while great is not absolute and given the acknowleged conflict and related unusual events, the Court of Appeals should have reversed the conviction below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A
117 F.3d. 1464

UNITED STATES of America, Appellee,

v.

J. C. Herbert BRYANT, Appellant.

No. 95-3148

United States Court of Appeals,
District of Columbia Circuit.

Argued May 8, 1997.

Decided July 8, 1997.

Appeal from the United States District Court
for the District of Columbia (No. 94cr00249-01)

John M. Colette argued the cause for the appellant.

Christine E. Sykes, Assistant United States Attorney, argued the cause for the appellee. Eric H. Holder, Jr., United States Attorney, and John R. Fisher, Thomas J. Tourish, Jr., and Mark H. Dubester, Assistant United States Attorneys, were on brief.

Before: SILBERMAN, HENDERSON and TATEL, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* HENDERSON.

Concurring opinion filed by *Circuit Judge* SILBERMAN.

Concurring opinion filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge:* J.C. Herbert Bryant appeals his conviction on one count of impersonating a federal official in violation of 18 U.S.C. § 912 [1] and one count of making false statements in violation of 18 U.S.C. § 1001.[2] For the reasons set out below we affirm his conviction on each count.

On September 2, 1992, Bryant, a Virginia resident, drove his truck into the District of Columbia and parked it near the entrance to the Mayflower Hotel, which was then hosting an Israeli diplomatic delegation. In the front window of the truck was a placard bearing the words "United States Marshal" in large bold print and in the rear compartment, visible

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[1] This statute provides:

> **Officer or employee of the United States**
>
> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 912.

[2] At the time of trial this statute, since amended, provided:

> **Statements or entries generally**
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001.

from without, lay 6 guns: three 9 mm Beretta pistols, a .44 caliber magnum revolver, a .357 caliber magnum revolver and a .22 caliber derringer. After a brief time inside the hotel, Bryant emerged to move the truck and discovered it had attracted the attention of several government officials, among them two United States Diplomatic Security Service Agents and two officers of the Metropolitan Police Department (MPD).

After Bryant approached the truck and identified himself as its driver, he was questioned at length about the weapons and about his identity. Bryant explained that he had left the firearms in the truck after a target shooting session at a northern Virginia firing range and informed the officers that he was a Warren County, Mississippi deputy sheriff, producing a badge and identification card as proof. According to the testimony of Diplomatic Security Service Agent Mark Connord, he also identified himself as a "Special Deputy U.S. Marshal." Excerpt from 10/3/94 Trial Tr. 1, 12, 45. The MPD officers on the scene contacted the District of Columbia United States Marshal's office to clarify his status. Responding to the call, Robert Williamson, a supervisory deputy marshal, arrived at the scene a short time later. Williamson testified at trial that he also heard Bryant identify himself as a "Special Deputy U.S. Marshal." Excerpt from 10/4/94 Trial Tr. at 21, 27. In addition, both Williamson and MPD Officer Anthony Suarez testified that Bryant claimed he had left his Marshals Service credentials in a briefcase at home.

During Bryant's detention outside the Mayflower, Marshal Herbert M. Rutherford III, United States Marshal for the District of Columbia, contacted the national Marshals Service headquarters in Virginia and attempted to ascertain Bryant's official status from several Marshals Service officials. When his attempts proved fruitless, Rutherford arranged, with the consent of the MPD officers, for Bryant and his truck to be brought to the District of Columbia Marshals Service office. After a brief interview, Rutherford released Bryant and his truck but retained the firearms. It was later determined that Bryant held no official position with the Marshals Service at the time of the incident, although he had previously been a

"Special Deputy Marshal"[3] for several successive one-year terms, the last of which ended on June 30, 1992.

Almost two years later, on June 14, 1994, Bryant was indicted on 3 counts: (1) violating 18 U.S.C. § 912 in that he "did falsely assume and pretend to be a Special Deputy United States Marshal and in such pretended character, demanded and obtained that he not be arrested by the Metropolitan Police Department for possessing and carrying weapons in the District of Columbia"; (2) violating D.C. Code § 22–3204(a)[4] in that he "did carry, openly, and concealed on or about his person, pistols, without a license issued as provided by law"; and (3) violating 18 U.S.C. § 1001 in that "in a matter within the jurisdiction of a department and agency of the United States, to wit, the United States Marshals Service, did knowingly make a false and fraudulent statement." Appellant's App. 10–11.

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[3] A special deputy is designated pursuant to 28 C.F.R. § 0.112, which provides:

> The Director, United States Marshals Service, is authorized to deputize the following persons to perform the functions of a Deputy U.S. Marshal in any district designated by the Director:
>
> (a) Selected officers or employees of the Department of Justice;
>
> (b) Selected federal, state, or local law enforcement officers whenever the law enforcement needs of the United States Marshals Service so require;
>
> (c) Selected employees of private security companies in providing courtroom security for the Federal judiciary;
>
> (d) Other persons designated by the Associate Attorney General pursuant to 28 CFR 0.19(a)(3).
>
> All such deputations shall expire on a date certain which shall be stated on the face of the deputation.

[4] This section provides in part: "No person shall carry within the District of Columbia either openly or concealed on or about their [sic] person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed."

A bench trial was held in October 1994 at which Bryant asserted as a defense to counts 1 and 3 that he never stated on September 2, 1992 that he was then a special deputy marshal and as a defense to count two that he was a duly appointed deputy sheriff of Warren County, Mississippi, exempt under D.C. Code § 22-3205(a)[5] from the statutory prohibition against carrying pistols without a license.

The district court convicted Bryant on counts 1 and 3 and acquitted him on count 2. On count 1, the court "specifically f[ound] that Mr. Bryant claimed to be a Special Deputy United States Marshal during the course of his conversations with the law enforcement officials on the scene," "credit[ing] the clear, firm and unequivocal testimony of Special Agent Conord," which he accepted "as honest and truthful," and "the clear and unequivocal testimony of Supervisory Deputy Marshal Williamson." Excerpt from 10/16/94 Trial Tr. 7. The court expressly rejected Bryant's "self-serving testimony that he never said he was a Special Deputy US Marshal," *Id.* 8. On count 3, the court similarly found "that Mr. Bryant represented to Special Agent Conord and to Deputy Williamson that he was a Special Deputy US Marshal, and that he had credentials at home in a briefcase that would substantiate his claimed status." *Id.* 9. He further found "beyond a reasonable doubt that Mr. Bryant deceitfully represented that he was a Special Deputy US Marshal, and this false statement is a criminal offense under 18 U.S.C. Section 1001."[6] *Id.* 10. Bryant appeals his convictions on four grounds. We address each in turn.

First, Bryant asserts that the evidence fails to support his conviction under either count 1 or count 3 because the government failed to prove that he ever represented he was a special deputy marshal. " 'The governing standard for re-

[5] This section provides in part: "The provisions of § 22-3204 shall not apply to marshals, sheriffs . . . or their deputies. . . ."

[6] He further concluded that Bryant's "assertion that he had credentials which were relevant to this issue was itself a misrepresentation within the meaning of Section 1001." Excerpt from 10/16/94 Trial Tr. 9.

viewing the sufficiency of the evidence in non-jury cases is the same as that applied in jury cases: The conviction must be reversed when the evidence is such that a reasonable mind could not find guilt beyond a reasonable doubt.'" *United States v. Thomas*, 864 F.2d 188, 191 (D.C. Cir. 1988) (quoting *United States v. Castellanos*, 731 F.2d 979, 984 (D.C. Cir. 1984)). Bryant argues that standard has been met because the "overwhelming" evidence, including testimony of witnesses he characterizes as more credible than those on whom the district court relied, supports his version of the facts. "'Our task,'" however, "'is to view the evidence in the light most favorable to the government, allowing the government the benefit of all reasonable inferences that may be drawn from the evidence, and permitting the [factfinder] to determine the weight and credibility of the evidence.'" *Id.* (quoting *United States v. Sutton*, 801 F.2d 1346, 1358 (D.C. Cir 1986)). We "do not ... 'weigh[ ] the evidence anew' nor do we require that the evidence 'exclude all reasonable hypotheses of innocence or lead inexorably to the conclusion that the defendant is guilty.'" *United States v. Wynn*, 61 F.3d 921, 923 (D.C. Cir. 1995) (quoting *United States v. Poston*, 902 F.2d 90, 94 (D.C. Cir. 1990); *United States v. Teffera*, 985 F.2d 1082, 1085 (D.C. Cir. 1993)). Deferring to the district judge's credibility determinations here, we must uphold his verdict because the testimony of Conord and Williamson, which we earlier described and which the district court expressly credited, suffices to persuade a reasonable person to find beyond a reasonable doubt that Bryant falsely identified himself as a special deputy marshal on September 2, 1992.

Second, Bryant asserts that count 1 of the indictment was invalid and that the evidence was insufficient to support the judge's verdict on that count because the indictment does not allege and the evidence does not support a finding that Bryant, if he represented himself as a special deputy marshal, "act[ed] as such, or in such pretended character demand[ed] or obtain[ed] any money, paper, document, or thing of value," as required under 18 U.S.C. § 912. We reject this argument as well. The indictment expressly alleges that in impersonating a special deputy marshal Bryant "demanded and obtained

that he not be arrested by the Metropolitan Police Department for possessing and carrying weapons in the District of Columbia." Appellant's Appendix 10–11.[7] We must, as we noted above, accept as true the district court's finding that Bryant in fact made the misrepresentations alleged. We must likewise accept the district court's finding that Bryant "made these misrepresentations knowingly and willfully with the purpose of avoiding arrest for possessing weapons in the District of Columbia," Excerpt from 10/12/94 Trial Tr. 8, because it too is sufficiently supported by the trial evidence. Suarez testified that when Bryant first returned to his truck MPD Sergeant Joseph Sandora asked whether he "was with the U.S. Marshal [sic] Service," to which Bryant replied that he was, Excerpt from 10/3/94 Trial Tr. 57–58, while Bryant himself testified that at the same time he was thinking about the weapons and the trouble they might cause him, Excerpt from 10/6/94 Trial Tr. 70. Bryant also testified that he was aware his truck might be towed and he himself taken to MPD headquarters, *id.* 75, and that he was "trying to stall for time" in the hope that someone from the Marshals Service would identify him, *id.* 78; *see also id.* 140–41. This testimony is sufficient to permit a reasonable person to find, at least inferentially, that Bryant misrepresented his status in order to avoid arrest.

Third, Bryant argues that the violation of section 1001 charged in count 3 is a lesser included offense of the section 912 violation charged in count 1 and therefore his conviction on both counts results in double punishment in violation of the double jeopardy clause of the fifth amendment to the United States Constitution. Again we disagree. The Supreme Court recently affirmed that whether a defendant is

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[7] Bryant does not dispute that police forbearance from arresting him qualifies as a "thing of value" within the meaning of 18 U.S.C. § 912. *See* Appellant's Br. 17–19 (discussing *United States v. Rippee*, 961 F.2d 677, 679 (7th Cir. 1992) ("Forbearance by the National City Police conferred upon Rippee a substantial benefit because if Rippee had received a ticket (instead of forbearance) he may have had to pay a fine, appear in court, and perhaps even shoulder an increase in insurance premiums.")).

punished twice for the same offense in violation of the double jeopardy clause is determined "by applying the rule set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932)," namely, "If 'the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.'" *Rutledge v. United States*, 116 S. Ct. 1241, 1245 (1996) (quoting *Blockburger*, 284 U.S. at 304). While each statute here entails a misrepresentation, each also contains an element absent from the other. Section 912 requires that the misrepresentation (specifically an impersonation) be used to "demand[ ] or obtain[ ] a benefit" and section 1001 requires that the offending misrepresentation be made "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." Thus, there is no double punishment and no double jeopardy violation.[8]

Finally, Bryant contends the district court erred in denying his motion under Rule 33 of the Federal Rules of Criminal Procedure to vacate the judgment and take new testimony based on newly discovered evidence, to wit: credentials establishing his membership in the United States Marshal's Association. We find no error in the court's denial. A new trial may be granted under Rule 33 "only when five conditions are met: '(1) [T]he evidence must have been discovered since the trial; (2) the party seeking the new trial must show diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal.'" *United States v. Sensi*, 879 F.2d 888,

[8] In fact, given that each of the statutory offenses contains an element unnecessary to the other, neither can be a lesser included offense of the other. *See United States v. Schmuck*, 489 U.S. 705, 709 (1989) (adopting "elements test" for lesser included offense "whereby one offense is necessarily included within another only when the elements of the lesser offense form a subset of the elements of the offense charged").

901 (D.C. Cir. 1989) (quoting *United States v. Kelly*, 790 F.2d 130, 133 (D.C. Cir. 1986)). The evidence cited by Bryant fails to satisfy at least two of the criteria: it is neither material nor likely to produce an acquittal. Membership in the Marshal's Association, which the district court described as "a private booster organization with no law enforcement status whatsoever,"[9] has no bearing on whether Bryant misrepresented himself to be a "special deputy marshal," the dispositive factual issue below.

For the preceding reasons, the judgment of the district court is

Affirmed.

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[9] *United States v. Bryant*, Criminal Action No. 94-249 (D.D.C. filed July 27, 1995).

SILBERMAN, *Circuit Judge, concurring*: This is a painful case. I am left with the strong impression that appellant should not have even been prosecuted, let alone convicted. He is a victim of hostile *Washington Post* reporting and its influence on a number of federal officials more concerned with protecting their own posteriors than ensuring the fair administration of the criminal law. Unfortunately, I cannot perceive any ground that permits me, legitimately, as an appellate judge, to vote to reverse the conviction.

Appellant had been a Special Deputy U.S. Marshal for seven years by virtue of his affiliation with a group of volunteers (ARGUS) (the Armed Response Group of the United States), which loaned armored vehicles to police agencies during emergencies. In 1992, *The Washington Post* published a series of articles critical of ARGUS and of Bryant, implying that he had been granted Special Deputy status because of his family money and political connections. *See, e.g.*, Robert O'Harrow, Jr., *FBI Probes Self-Styled Police Force*, WASH. POST, May 10, 1992, at A1. The then-Director of the Marshals Service Henry Hudson wrote Bryant advising him to send Hudson a letter asking not to be reappointed, which Bryant did. His appointment thus expired on June 30, 1992, only two months before the events leading to his conviction.

Appellant can be thought guilty of a crime—assuming his politically incorrect possession of guns, attachment to a law enforcement agency, his wealth, and Virginia–Mississippi connections are not sufficient to call for imprisonment—only if he actually said at the Mayflower on September 2, 1992, that he was at that time a Special Deputy U.S. Marshal, not that he had been, which was true, or that he was closely affiliated with the Marshals Service, which also was true.

A careful examination of all of the testimony, which is only sketchily presented in the majority opinion, leads me to conclude that it is very unlikely that Bryant actually said he held the Special Deputy office when trying to extricate himself from a very dicey situation, and that it was Marshal

Rutherford who made the crucial representations. From the moment Deputy Williamson arrived at the Mayflower and Bryant told him he knew Rutherford, Bryant received respectful treatment. Williamson, Rutherford's subordinate, testified that he immediately tried to contact Rutherford for Bryant. When Rutherford returned the call, Williamson told him that "the police officer on the scene wanted to resolve [the matter] and either arrest Herb Bryant or wanted us to tell him that he was a Special Deputy or Deputy United States Marshal," which prompted Rutherford to ask Williamson to stall while he called headquarters. Rutherford thereafter spoke to Sergeant Sandora and admitted that he told the sergeant that Bryant was *known* by the Marshal Association. Astonishingly, he also testified that he *could not remember* if he told Sandora that Bryant was previously a Special Deputy or many details of the call, but importantly, after this discussion, the police department offered the marshals custody of Bryant to sort out the matter and the marshals accepted. So the key to Bryant's release was Rutherford's intervention.

Rutherford even rejected Sandora's suggestion that the police take custody of the guns. Instead, a marshal drove Bryant's vehicle to the courthouse, returned much of the gear (including knives) to Bryant that same day, and inventoried the guns to send to Bryant later. Bryant was escorted by Williamson to Marshal Rutherford's office. Rutherford called Deputy Director Twomey and left his own office to allow Bryant to speak in private to Twomey. Neither Rutherford nor Twomey ever asked Bryant what he told the officers on the scene or about his current status. Instead, he was released without suggestion that he had done anything inappropriate, much less in violation of federal law.

The redoubtable *Washington Post* reporter Mr. O'Harrow, learning of the incident, published a news story in the *Post* some three weeks later, on September 24, accusing the Marshals Service of intervening to help Bryant.

> After Bryant told police he had friends in the Marshals Service, a deputy marshal was sent to the scene, law

> enforcement officials said.... When asked why no legal action was taken against Bryant, Twomey said the District police officer 'chose simply to turn the weapons and Mr. Bryant over to the marshal.' But the District police official, who ordered the retrieval of Bryant's guns from the Marshals Service yesterday, said Bryant was released only because *the Marshals Service* 'represented to us he was a U.S. Marshals deputy.'

Robert O'Harrow, Jr., *Quasi-Police Official Freed in Gun Case*, WASH. POST, Sept. 24, 1992, at A1 (emphasis added). Only then does the question of appellant's misrepresentation arise. *Id.* ("[A]fter inquiries from the Washington Post, District Police said they plan to investigate the Sept. 2 incident and turn over their findings to the U.S. attorney in the District."). Both the marshals' headquarters and the Marshals Office in the District of Columbia disclaimed responsibility for allowing Bryant to be released and at trial blamed each other for improper behavior.[1]

Rutherford's testimony is laced with concern as to how the press would cover the story. From the moment he found out that Bryant was being detained, he thought the "situation would prove to be somewhat sticky for the United States Marshal's Service." He confessed that fear of press coverage was one reason he did not go to the scene himself. He testified that he thought Twomey deliberately tried to stay out of the matter so that Rutherford would be saddled with the decision and Twomey could have "deniability." Rutherford admitted that he talked to O'Harrow, who wrote the story describing the representation as coming from the marshals, before the article was published.[2]

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[1] Rutherford as the Marshal for the District of Columbia is a presidential appointee confirmed by the Senate. The Mayflower events took place two months before the presidential election. After the election, but before the trial, Hudson and Twomey had left office.

[2] Rutherford had also previously spoken with O'Harrow about Bryant's role with ARGUS.

Both the ex-Director and Deputy Director of the Marshals' Office contradict all the material facts of Rutherford's story. Rutherford testified that no one at headquarters, including Twomey, told him of Bryant's actual status with the marshals. When Rutherford called headquarters to find out Bryant's status so as to decide how to handle the situation at the Mayflower, he initially did not try to reach Twomey, whom Rutherford knew to be in charge of the Special Deputy program, but instead tried to reach Hudson directly because Rutherford did not think Twomey looked out for the "best interest of [Hudson]." Only after his unsuccessful attempt to talk to Hudson, did Rutherford call Twomey, who supposedly told him that he, Twomey, didn't know Bryant's status. Indeed, according to Rutherford, Twomey *never* told him of Bryant's status. But Twomey testified that, without question, he told Rutherford, during the incident, that Bryant was no longer a Special Deputy U.S. Marshal.

Rutherford testified that he spoke with "someone" (perhaps not surprisingly, he couldn't remember whom) who told him that Bryant "was claiming to have some affiliation with or to be a deputy or special deputy United States Marshal."[3] Rutherford also claimed that, a few days after the incident, Twomey called him at home to find out if Bryant had claimed to be a Deputy Marshal. Rutherford patched Williamson into the call, and Williamson supposedly said that Bryant had claimed to be a Deputy U.S. Marshal. But Twomey flatly denied that he called Rutherford at home after the incident or that he had had a three-way call with Williamson. Twomey testified that he "never spoke with Deputy Williamson ... at any time on the day of the incident or at any time thereafter to this date" and that he "didn't even know the names of the deputies that went to the scene." It is also rather suspicious that Rutherford did not mention the three-way call in his

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[3] Rutherford tried to explain away his use of the term "affiliation," which would be an accurate characterization of Bryant's relationship with the marshals, by noting that he thought if a person is a Deputy U.S. Marshal, he is certainly "affiliated with the agency also."

initial statement to the inspector general, but included it only much later in an addendum.

Both Twomey and Hudson testified that no one at the time of the incident reported to either of them that Bryant had represented himself to be a Special Deputy or Deputy U.S. Marshal. Twomey said he did speak to Rutherford about misrepresentations, but these were alleged misrepresentations of the marshals, *not* Bryant. When Twomey read the *Washington Post* article, he was "highly disturbed by the implication in the article ... that Deputy U.S. Marshals had represented to the Metropolitan Police that Mr. Bryant was a Deputy U.S. Marshal or a Special Deputy U.S. Marshal." Wanting to make "absolutely sure" that the marshals did not improperly attempt to influence the D.C. police or do anything that "would embarrass the Marshal's Service as an agency," Twomey called Rutherford at his office to determine what actually was said; Rutherford told him that no marshal had made a representation to the police that Bryant was deputized. Rutherford conceded, however, that no other marshal spoke with the metro police department nor did any other marshal have the authority to make such a representation to the police.

The district court did not resolve this troublesome conflict between Rutherford and the Director and Deputy Director but instead relied on what the judge described as "clear and unequivocal" testimony of Williamson, Rutherford's subordinate Supervisory Deputy. Yet even Williamson testified initially that Bryant "implied" he was a Special Deputy and only after being pushed said, "[Bryant] said he was a special deputy." And Rutherford admitted that when he spoke with Williamson, Williamson may have told him that Bryant was "associated or affiliated with the Marshal Service" as opposed to stating he was a Deputy or Special Deputy. Williamson's testimony, even putting aside his subordinate relationship to Rutherford, does not therefore seem so compelling.

The other witness relied upon by the district court was Special Agent Conord, who, the district court assumed, had "no apparent reason for bias in favor of or against the

defendant, the marshals or the Metropolitan Police." It should be noted, however, that Conord and Agent Perkins were the first to respond to the potential security threat. It was Conord who allowed the matter to be turned over to the Marshal's Office. If Bryant did not claim to be a "Special Deputy United States Marshal" and was instead left to the marshals because of his less formal relationship with the service, Conord might have been thought derelict in his duties by treating a potential threat to Israeli diplomats so causally. Conord had, of course, read the *Washington Post* article and he was aware of the Justice Department and FBI investigation of the incident. Surely he knew that his own conduct—it was he who spoke to Bryant—could be subject to questioning. Yet if Bryant was thought to have stated unequivocally that he was a Special Deputy Marshal, Conord might well be less subject to criticism.

Conord's testimony, moreover, is hardly convincing. He could not "remember clearly" how long he was outside before the police arrived, could not "recall exactly" what the placard said, could not "recall exactly" whether Bryant made statements about people he knew in law enforcement, and could not "remember specifically" what the tag on the vehicle stated; nevertheless he remembered with the utmost clarity that Bryant said, "I am a Special Deputy U.S. Marshal" as opposed to saying a former Special Deputy or otherwise referring to his legitimate, albeit more complicated, relationship. Conord explained that although he was "vague on some of the technical and the specifics of the conversation, [he] remember[ed] the large picture." Perkins testified, however, that Conord and the officers on the scene told him only that Bryant was "associated with the Marshal's Service or he's with the Marshal's Service. But nobody ever told me Mr. Bryant says he is a Special Deputy Marshal." And, at one point, Conord himself testified that Bryant claimed an "affiliation" with the Marshals Service, prompting the district court to ask why Bryant would say "affiliation" when he was supposedly representing himself as a Special Deputy. "A lot of things didn't seem to add up at the time," was Conord's explanation.

Too much about this case does not add up. It is not just the shaky and unreliable testimony against Bryant, it is also the testimony from unbiased sources strongly supporting Bryant. Officer Suarez, the Metropolitan Police Department officer conducting the inquiry of Bryant at the scene, did not once mention in his contemporaneous notes that Bryant claimed to be a Special Deputy Marshal. And Carl Crawford, the security director for the Mayflower, vouched for Bryant's depiction of the events. Bryant claimed to be "associated with the United States Marshal's Service" and "use[d] names of people that were in the Marshal's Service" but did not say that he was a U.S. Marshal, according to Crawford, who paid close attention to Bryant's answers because of his "concern . . . for the people that were in the hotel." Crawford thought Bryant was merely trying to show he was well-connected with law enforcement, which of course he was.

As a Justice Department alumnus, I simply cannot imagine approving, had it come to me, the prosecution of Bryant, who seems to be an unfortunate scapegoat. As a judge, I cannot understand how the district judge could have concluded that the government made out its case beyond a reasonable doubt. But I am powerless, given the scope of review of a district judge's factual findings, from seeking to rectify this gross injustice.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring:

I write separately for two reasons. First, I share the concerns expressed in Judge Silberman's concurring opinion and agree that, given the circumstances, Bryant should not have been prosecuted or convicted. Second, I believe that a special deputy United States marshal is not an "officer or employee of the United States" the impersonation of which is proscribed by 18 U.S.C. § 912.

Special deputy marshals are designated under the purported authority of 28 C.F.R. § 0.112 which provides that "[t]he Director, United States Marshals Service, is authorized to deputize ... to perform the functions of a Deputy U.S. Marshal in any district designated by the Director," among others, "[s]elected federal, state, or local law enforcement officers." Whatever other effect such a special deputation may produce, it cannot transform a local law enforcement officer into a federal one. The Director's appointment authority is fixed by statute. He "is authorized to appoint and fix the compensation of such employees as are necessary to carry out the powers and duties of the Service" and "may designate such employees as law enforcement officers." 28 U.S.C. § 561(f).[1] He has no statutory authority to appoint anyone other than a Marshals Service employee or official as an "officer" of any kind.[2] Thus, his deputation of an individu-

[1] Section 561(f) provides in full: "The Director is authorized to appoint and fix the compensation of such employees as are necessary to carry out the powers and duties of the Service and may designate such employees as law enforcement officers in accordance with such policies and procedures as the Director shall establish pursuant to the applicable provisions of title 5 and regulations issued thereunder."

[2] The statutes repeatedly emphasize that the Director's authority extends only over officials and employees *of the Marshals Service*, a class that does not encompass special deputy marshals. The Director serves "at the head of the United States Marshals Service," 28 U.S.C. § 561(a), and is authorized to administer oaths and to take affirmations "of officials and employees of the Service," 28 U.S.C. § 561(h). In addition only an "official of the Service" may

al outside the Service as a special deputy marshal does not confer "federal officer" status on that individual and, therefore, impersonation of a special deputy marshal should not violate section 912.[3] Nevertheless, I am constrained to join in affirming Bryant's conviction on count 1 because circuit precedent holds that the statute can be violated even when the assumed office does not exist. *See United States v. Maxwell*, 920 F.2d 1028, 1037 n.11 (D.C. Cir. 1990) (citing *United States v. Rosser* 528 F.2d 652, 656 n.14 (D.C. Cir. 1976)). Although I believe the circuit precedent is wrong, I am nevertheless bound by it.

"be designated by the Director" to carry firearms and to make warrantless arrests. 28 U.S.C. § 566(d).

[3] I am aware that the Ninth Circuit has concluded that a special deputy is protected by 18 U.S.C. § 111, entitled "Assaulting, resisting, or impeding certain officers or employees," which prohibits assaults against specific persons enumerated in 18 U.S.C. § 1114. *United States v. Diamond*, 53 F.3d 249, 252–53 (9th Cir. 1995). In *Diamond*, however, the Ninth Circuit merely construed the language of section 1114, concluding that a special deputy marshal fell within the statutory category of "any United States ... deputy marshal." The court did not address the scope of the Marshals Service Director's statutory appointment authority and did not hold that a special deputy is a "federal officer."

Supreme Court, U.S.
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No. 97-965

In the Supreme Court of the United States

OCTOBER TERM, 1997

J. C. HERBERT BRYANT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a Special Deputy U.S. Marshal is an "officer or employee acting under the authority of the United States" within the meaning of 18 U.S.C. 912.

2. Whether the evidence at trial was sufficient to sustain petitioner's convictions.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a[1]) is reported at 117 F.3d 1464.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1997. A petition for rehearing was denied on September 15, 1997. The petition for a writ of certiorari was filed on December 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of Columbia, petitioner

[1] We have renumbered the pages of petitioner's appendix to run consecutively.

was convicted on one count of impersonating a federal officer, in violation of 18 U.S.C. 912, and one count of making a false statement in a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001 (1988). He was sentenced to six months' imprisonment, to be followed by two years' supervised release, and was fined $5,000.

1. On September 2, 1992, petitioner, a Virginia resident, parked his blue Chevrolet Suburban truck near the entrance to the Mayflower Hotel in Washington, D.C. At the time, an Israeli diplomatic delegation was staying at the Mayflower. Before petitioner went inside the hotel, he placed a placard with the words "United States Marshal" on the dashboard near the truck's front window. Israeli diplomatic security agents examined petitioner's parked truck and saw, in plain view, six firearms and miliary-type gear in the rear cargo compartment of the truck. The Israeli security agents immediately contacted agents of the Department of State's Diplomatic Security Service (DSS), which was providing security for the Israeli delegation. Shortly thereafter, two DSS agents arrived and confirmed that firearms were visible in the rear cargo compartment of petitioner's truck. The agents also noted that the truck had police lights hidden behind the front grille and Mississippi license plates. While the DSS agents attempted to ascertain who owned the vehicle, two officers from the Metropolitan Police Department of the District of Columbia (MPD) arrived on the scene. Pet. App. 2a-3a; Gov't C.A. Br. 3-4.

Shortly afterwards, petitioner emerged from the hotel and approached the truck. One of the MPD officers asked whether petitioner was with the U.S. Marshals Service, and petitioner replied that he was.

Petitioner told one of the DSS agents, Mark Conord, that he was a "Special Deputy U.S. Marshal." When asked for his credentials, petitioner said that he had left his Marshals Service credentials at home, and he produced a badge and a card identifying himself as a deputy sheriff for Warren County, Mississippi. Petitioner stated that the firearms were in his truck because he had been target-shooting at a firing range the previous day. Pet. App. 3a; Gov't C.A. Br. 4-5, 7-8.

The MPD officers called the U.S. Marshal's office to clarify petitioner's status, and Supervisory Deputy Marshal Robert Williamson went to the scene. Petitioner told Williamson that he was a Special Deputy Marshal but had left his credentials at home. Petitioner also said that he knew the U.S. Marshal for the District of Columbia, Herbert M. Rutherford, III. Williamson contacted Rutherford, who had been trying unsuccessfully to find out petitioner's official status from the Marshals Service's national headquarters, on the telephone. At Rutherford's request, the MPD officers agreed to release petitioner to the Marshals Service. Williamson drove petitioner to Rutherford's office at the courthouse, and another deputy drove petitioner's truck there. After a brief interview, Rutherford released petitioner and his truck, but the Marshals Service retained the firearms. Pet. App. 3a; Gov't C.A. Br. 5-6.

2. a. Petitioner was charged with pretending to be an officer acting under the authority of the United States (a Special Deputy United States Marshal) in order to obtain something of value (to be not arrested by the MPD for unlawful possession of a firearm), in violation of 18 U.S.C. 912, and one count of making a false statement in a matter within the jurisdiction of an agency of the United States, in violation of 18

U.S.C. 1001 (1988).[2] At trial, the Director of the Marshals Service at the time of the incident, Henry Hudson, testified that he knew petitioner, and that petitioner had been a Special Deputy Marshal for six or seven years because of his work with the Marshal's Foundation, a non-profit organization that assists the families of slain deputies. Hudson further testified that petitioner's special deputization had expired on June 30, 1992, and that petitioner had not been reappointed. Pet. App. 3a-4a; Gov't C.A. Br. 7. Petitioner also testified in his own defense at trial. He claimed that he did not tell any of the law enforcement agents on September 2, 1992, that he was a Special Deputy Marshal. Pet. App. 5a; Gov't C.A. Br. 8-9.

b. The district court found petitioner guilty. The court "specifically f[ound] that [petitioner] claimed to be a Special Deputy United States Marshal during the course of his conversations with the law enforcement officials on the scene." Pet. App. 5a (citing trial transcript). The court "credit[ed] the clear, firm and unequivocal testimony of [DSS] Special Agent Conord" and "the clear and unequivocal testimony of Supervisory Deputy Marshal Wiliamson." *Ibid.* The court expressly rejected petitioner's "self-serving testimony that he never said he was a Special Deputy US Marshal." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-18a. The court rejected petitioner's claim that the evidence at trial was insufficient to sustain his convictions because it did not establish that he had

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[2] Petitioner was also charged with one count of carrying a pistol without a license, in violation of D.C. Code § 22-3204(a). The district court acquitted him of that charge. See Pet. C.A. App. 101.

represented on September 2, 1992, that he was a Special Deputy Marshal. *Id.* at 5a-6a. "Deferring to the district judge's credibility determinations," the court explained, "we must uphold his verdict because the testimony of Conord and Williamson * * * suffices to persuade a reasonable person to find beyond a reasonable doubt that [petitioner] falsely identified himself as a special deputy marshal on September 2, 1992." *Id.* at 6a.

The court likewise rejected petitioner's claim that the evidence was insufficient to sustain his conviction for impersonating a federal officer because it did not establish that he had demanded or obtained any thing of value while misrepresenting himself as a Special Deputy Marshal. Pet. App. 6a-7a. The court concluded that the evidence was "sufficient to permit a reasonable person to find, at least inferentially, that [petitioner] misrepresented his status in order to avoid arrest." *Id.* at 7a.

Judge Silberman concurred. Pet. App. 10a-16a. Although he was "left with the strong impression that appellant should not have been prosecuted, let alone convicted," *id.* at 10a, he concluded that he was "powerless, given the scope of review of a district judge's factual findings, from seeking to rectify" what he termed "this gross injustice." *Id.* at 16a.

Judge Henderson, who wrote the majority opinion, also wrote a separate concurring opinion. Pet. App. 17a-18a. She stated that she "share[d] the concerns expressed in Judge Silberman's concurring opinion and agree[d] that, given the circumstances, [petitioner] should not have been prosecuted or convicted." *Id.* at 17a. In addition, Judge Henderson "believe[d] that a special deputy United States marshal is not an 'officer or employee of the United States' the imper-

sonation of which is proscribed by 18 U.S.C. § 912." *Ibid.* In her view, the Director of the Marshals Service "has no statutory authority to appoint anyone other than a Marshals Service employee or official as an 'officer' of any kind." *Ibid.* (footnote omitted). Judge Henderson, however, felt "constrained to join in affirming [petitioner's] conviction [for impersonating a federal officer] because circuit precedent holds that the statute can be violated even when the assumed office does not exist." *Id.* at 18a.

ARGUMENT

1. Petitioner contends (Pet. 9-16) that his conviction for impersonating a federal officer under 18 U.S.C. 912 should be reversed because a Special Deputy United States Marshal is not an "officer or employee" of the United States within the meaning of Section 912.[3] That argument is without merit. Section 912 provides:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or

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[3] In his opening brief in the court of appeals, petitioner did not advance the argument that a Special Deputy U.S. Marshal is not an officer or employee of the United States. See Pet. C.A. Br. 14-35. On May 9, 1997, after oral argument, the court of appeals directed the parties to address the issue in supplemental briefs. See Gov't Supp. C.A. Br. 1. Although Judge Henderson discussed the issue in her separate concurring opinion, the panel of the court of appeals did not discuss it in the majority opinion. Consequently, the issue was neither pressed by petitioner nor passed on by the court below, and the claim is not properly raised here. Cf. *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

> officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be [punished according to law].

A duly appointed Special Deputy Marshal is clearly an "officer or employee acting under the authority of the United States" for purposes of Section 912. Pursuant to 28 U.S.C. 509 and 510, the Attorney General has delegated to the Director of the Marshals Service the authority to deputize "[s]elected federal, state, or local law enforcement officers whenever the law enforcement needs of the U.S. Marshals Service" require the use of such officers to perform the functions of a Deputy U.S. Marshal. 28 C.F.R. 0.112. Because a Special Deputy Marshal is authorized to perform the federal functions of a Deputy Marshal as a result of his deputization, a local law enforcement official selected as a Special Deputy U.S. Marshal is "acting under the authority of the United States" within the meaning of Section 912.[4] Cf. *Lamar* v. *United States*, 241 U.S. 103, 112-113 (1916) (holding, based on the "nature and character of their duties and responsibilities," that Members of the House of Representatives are "officers" under the predecessor provision to Section 912, and that one who impersonates a Member is covered by statute); *United States* v. *Diamond*,

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[4] Petitioner errs in relying on various indications in administrative practice that Special Deputy Marshals are not employed by the United States, in the sense that the positions are not covered by federal employment statutes and regulations. Pet. 11-13. The statute at issue, however, does not reach just those who claim to hold positions actually covered by federal employment regulations; it reaches all those who falsely claim to be acting with federal authority.

53 F.3d 249, 251-252 (9th Cir.) (assault on Special Deputy U.S. Marshal covered by 18 U.S.C. 111, prohibiting assaults on any federal officer, including, by incorporation of 18 U.S.C. 1114, "any United States marshal or deputy marshal"), cert. denied, 116 S. Ct. 326 (1995).

Furthermore, in *United States* v. *Barnow*, 239 U.S. 74, 78 (1915), this Court made clear that the nonexistence of a federal office that an impersonator pretends to hold was not a defense under the predecessor provision to Section 912:

> It is the false pretense of Federal authority that is the mischief to be cured; of course, only when accompanied with fraudulent intent, but such a pretense would rarely be made for benevolent purposes. Now, the mischief is much the same, and the power of Congress to prevent it is quite the same, whether the pretender names an existing or a non-existing office or officer, or, on the other hand, does not particularize with respect to the office that he assumes to hold.

The courts of appeals have reached the same conclusion under Section 912. See *United States* v. *Maxwell*, 920 F.2d 1028, 1036-1037 & n.11 (D.C. Cir. 1990) (conviction for pretending to be "'Special Consultant' to the United States Department of the Treasury"); *United States* v. *Rosser*, 528 F.2d 652, 656 n.14 (D.C. Cir. 1976) (defendant purported to be employee of IRS); *Caruso* v. *United States*, 414 F.2d 225, 226-227 (5th Cir. 1969) (defendant purported to be non-existent Administrator of Veterans Hospital). In this case, petitioner pretended to be an officer acting under the authority of the United States when he claimed that he was a Special Deputy Marshal after his special

deputization had expired. Accordingly, petitioner's conviction under Section 912 is valid, whether or not a duly appointed Special Deputy Marshal is, in fact, an officer or employee acting under the authority of the United States.[5]

2. Petitioner also contends (Pet. 16-17) that "[t]here was no convincing evidence upon which a guilty verdict could be based" because "[c]onflicting testimony, questionable memory, bias and concern about an alleged 'cover-up' abounded [among the witnesses at trial]." That contention, however, raises only a fact-bound claim that the lower courts erred in finding sufficient evidence to convict petitioner, and such a claim does not warrant review by this Court. The Court has emphasized that "[t]he primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals." *Hamling* v. *United States*, 418 U.S. 87, 124 (1974). Moreover, this Court has made clear that it is not the role of an appellate court "to weigh the evidence or to determine the credibility of witnesses." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Rather, an appellate court must affirm a criminal conviction as long as, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979);

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[5] This Court's decision in *Pierce* v. *United States*, 314 U.S. 306 (1941), on which petitioner relies (Pet. 10) is not to the contrary. In that case, the Court merely held that the predecessor provision to Section 912 did not reach the impersonation of officers or employees of a government corporation, in that case the Tennessee Valley Authority. 314 U.S. at 310-311.

see also *Burks* v. *United States*, 437 U.S. 1, 17 (1978). Applying that well settled standard of review, the court of appeals correctly concluded in this case that the evidence at trial was sufficient to sustain petitioner's convictions on both counts. Petitioner's fact-specific claim to the contrary raises no important issue of federal law warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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